No. 84-56

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARY WILLIAMS CAZALAS, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner claims that she was dismissed from her position as an Assistant United States Attorney because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and that her dismissal violated her rights under the First and Fifth Amendments. She seeks damages and declaratory and injunctive relief against both the government and the officials responsible for her dismissal.

1. Petitioner filed suit in the United States District Court for the Eastern District of Louisiana. After a trial, that court rejected her claims in a detailed opinion (Pet. App. A2-A46; 569 F. Supp. 213). The court concluded that petitioner was discharged for "legitimate, nondiscriminatory reasons" (Pet. App. A42) — specifically, because of "a lack of discretion and good judgment, incompetence, unwillingness to function as an advocate for the government's clients,

lack of supervisability, inability to maintain office confidences, inability to get along with clients, and overstepping the boundaries of the position as an Assistant United States Attorney" (*id.* at A8-A9). In support of its conclusion, the district court recounted some of the numerous incidents that led to petitioner's dismissal. For example, petitioner confessed error in a case before the court of appeals without the approval of her superiors (*id.* at A15-A16); when confronted by a supervisor about this incident, she revealed the internal dispute to a private attorney in an attempt to enlist his support (*id.* at A16-A17); she disregarded repeated instructions from superiors to file a motion to dismiss a complaint against the government (*id.* at A19-A10); she accused a female supervising attorney of directing her to "lie to the courts" when the supervisor instructed her to argue a tenable legal theory (*id.* at A21-A22); she told a federal magistrate [redacted] that a district judge who had ruled against the government was influenced by improper political concerns (*id.* at A22); and she issued statements concerning prosecutorial policy without authorization (*id.* at A25). A court of appeals judge testified that petitioner was one of the two or three attorneys he had had occasion to admonish because of the poor quality of her work (*id.* at A18-A19).

The court of appeals affirmed the district court's decision "on the basis of its findings of fact and conclusions of law" (Pet. App. A1). The bulk of the petition (Pet. 2-16) is an undisguised effort to relitigate the factual issues that were resolved against petitioner by the courts below. The concurrent determination of those courts that petitioner was dismissed for reasons other than her sex is manifestly correct, and petitioner suggests no reason for this Court to second-guess that determination.

2. Invoking *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), petitioner seeks damages from some of the government officials

responsible for her dismissal on the ground that they violated her First Amendment rights.[1] See Pet. 25-28. The district court correctly ruled that this claim was precluded by *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981), which was subsequently affirmed by this Court (462 U.S. 367 (1983)). In *Bush*, a federal employee asserted that he was disciplined in retaliation for the exercise of First Amendment rights; this Court held that his *Bivens* claim was barred. The Court reasoned that because the employee's claim "ar[o]se out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States" it would be "inappropriate * * * to supplement that regulatory scheme with" a *Bivens* remedy. *Bush*, 462 U.S. at 368.

Because petitioner was an Assistant United States Attorney, she could not invoke precisely the same remedies as the employee in *Bush* (compare *Bush*, 462 U.S. at 380-389, with 28 U.S.C. 542(b)). But petitioner is incorrect in asserting (Pet. 25, 27, 28) that she has no remedy other than a *Bivens* action. As the district court itself pointed out (Pet. App. A38), the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, provided petitioner a remedy for a dismissal or other adverse personnel action taken in retaliation for "whistle-blowing" or certain other exercises of First Amendment rights. See 5 U.S.C. 2302(b)(8), (10), (11). See also *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983). The Act authorizes an aggrieved employee to file a claim with the Special Counsel of the Merit Systems Protection Board, who "shall investigate" the complaint (5 U.S.C. 1206(a)(1)) and may request action by the Board (5 U.S.C.

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[1]As petitioner appears to recognize, her sex discrimination claim can be brought only under Title VII and cannot be the basis of a *Bivens* action. See *Brown* v. *General Services Administration*, 425 U.S. 820 (1976); *Davis* v. *Passman*, 442 U.S. 228, 247 n.26 (1979).

1206(c)(1)(A)). The Board "may order such corrective action as the Board considers appropriate" (5 U.S.C. 1206(c)(1)(B)). Petitioner makes no mention of this alternative remedy and does not suggest why, under *Bush,* it is insufficient to bar her *Bivens* claim.[2]

3. Petitioner further contends (Pet. 21-25) that the procedure by which she was dismissed violated the Due Process Clause of the Fifth Amendment because "she was terminated without being advised of the reasons therefor and without being afforded an opportunity to overcome the false allegations against her" (Pet. 21). The statute governing petitioner's employment as an Assistant United States Attorney specifies that she was "subject to removal by the Attorney General" and places no limitation or qualification on the Attorney General's removal authority. 28 U.S.C. 542(b). Petitioner therefore had no protected property interest in continued employment as an Assistant United States Attorney. See, *e.g., Board of Regents* v. *Roth,* 408 U.S. 564, 578 (1972).

Even assuming that petitioner had a protected interest in her position, however, she received all the process that was due. She was advised of the reasons for her dismissal, both informally before her dismissal and formally in the letter informing her that she was dismissed (see Pet. App. A82-A83, A84). She was also offered an opportunity to give her

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[2]In any event, petitioner's *Bivens* claim would have to be dismissed unless a violation of clearly established First Amendment rights were shown. *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982). The district court found that petitioner was dismissed for certain actions, many of which did not involve speech at all and none of which involved constitutionally protected speech. See *Connick* v. *Myers,* 461 U.S. 138, 143-154 (1983). At the very least, it cannot seriously be claimed that petitioner's dismissal violated clearly established First Amendments rights, especially in view of *Connick.*

version of the events; for example, the Director of the Executive Office for United States Attorneys met with petitioner before formally recommending her removal so that she could "tell * * * her side of the story" (*id.* at A82). In addition, petitioner pursued her Title VII remedies and had an opportunity to pursue her Civil Service Reform Act remedy; both of those proceedings provided ample opportunity for petitioner to contest the decision to dismiss her.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1985

DOJ-1985-01